

Andrew Wauchope, *Esquire*, Appellant.

Sir Archibald Hope, *Baronet*, and Captain } Respondents.
John Macdowal, - - - - - }

The Respondents C A S E.

THE Lands of *Woolmet*, in the County of *Edinburgh*, formerly belonged to a Family of the Name of *Biggar*, and are now the Property of Mr. *Charteris* of *Aimsfield*.

Mr. *John Biggar*, the Representative of the old Family, having betaken himself to the carrying on of *Coal-works*, in which he was much conversant, in 1723 took a Lease of the Coal in the Estate of *Woolmet*, for a Term of Three Nineteen Years.

The Lands of *Woolmet* lie at the Distance of about Four Miles to the East of the City of *Edinburgh*:—From them there is a gentle Fall to the Sea.—But in this Space, Four different Properties intervene:—*First*, An Angle of Mr. *Wauchope* of *Edmonstone*'s Estate, which interjects between *Woolmet* and the Appellant's Lands:—*Secondly*, The Appellant's whole Estate of *Niddry*:—*Thirdly*, A Part of the Estate of *Brunstane*:—And, *Fourthly*, The Earl of *Abercorn*'s Estate of *Dudingston*, which runs to the Sea Shore.

The *Woolmet* Veins or Seams of Coal running through all these other Lands to the Sea, Mr. *Biggar* imagined it would be of Advantage to the *Woolmet* Coal, to have a Level to it through One of these Veins.

With this View, he first got from the Earl of *Abercorn* a Lease of the Coal in the *Dudingston* Estate for Nineteen Years from *Martinmas* 1745; and it is provided by the Lease, "That it shall be in the Power of either of the said Parties, or their *Forefairs*, (Heirs and Assigns) if they shall hereafter find it necessary, to communicate the Level of the said Coal to any neighbouring *Coal-Works*: Provided always, that they be obliged, like as they hereby bind and oblige them, and their *Forefairs*, to submit to Arbiters to ascertain the Consideration to be paid by any One of the said Parties to the other on that Account."

Mr. *Biggar* next purchased the same Liberty of continuing the Level through that Part of the Estate of *Brunstane*, which interjects between the *Dudingston* and *Niddry* Estates.

And, in 1748, he entered into a Lease for Nineteen Years with the Appellant, for all the Coal and Coal Seams within his Lands of *Niddry*. This Lease contains a Covenant for communicating the Level to that Colliery, and continuing it through the Appellant's Estate to the upper Collieries; which is thus expressed: "And whereas by Tack entered into betwixt the said *John Biggar* and the Earl of *Abercorn*, of Date the 23d April and 9th of May 1746 Years, it is amongst other Things declared, That it shall be in the Power of One or either Party to communicate the Level of the said Earl's Coal of *Dudingston* to any neighbouring *Coal-Works*, and to submit to Arbiters to determine what Consideration either of the said Parties is to pay the other for the Liberty of such Communication: It is therefore hereby agreed, that the said *John Biggar* shall procure the said Earl's Consent to communicate said Level to the foresaid Coal of *Niddry*; and that the said *Andrew Wauchope* shall reimburse the said *John Biggar* of the One Half of the Consideration to be paid by him to the said Earl, for the Benefit of communicating his Level to the said Coal of *Niddry*, provided the said Half does not exceed the Sum of 1000 Merks Scots: AND FURTHER, it is hereby declared, that in case it shall be found afterwards necessary and beneficial to communicate the said Level to the said Coal of *Niddry*, to any neighbouring Heritor's Coal, the same shall only be done with the Advice and Consent of both Parties, and not otherwise; and the Consideration to be received for such Communication of the Level, shall pertain and be equally divided betwixt them: AND FARTHER, the said *John Biggar* binds and obliges himself, and his *Forefairs*, to leave a sufficient *Chimney-Wall* betwixt the *Niddry* Coal and those of the Neighbourhood, except in that Seam of Coal whereby the Level is to be communicated to any neighbouring Heritor in the Terms before mentioned; in the which Seam he shall have Liberty to work through the said *Chimney-Wall*, into the neighbouring Heritor's Grounds; and that whenever the said Level is brought up, and communicated into the Coal in the Lands of *Woolmet*, the said *John Biggar* obliges him and his *Forefairs* not to communicate the Benefit thereof to any neighbouring Heritor's Grounds, without the Advice and Consent of the said *Andrew Wauchope* first had and obtained thereto."

Mr. *Biggar* then began to run a Level from the Sea through all these different Estates; but having died before the Work was completed, it was carried on by his Brother and Successor, Mr. *Andrew Wallace*; and he having also died after having brought the Level almost up to the *Woolmet*-Coal, the Respondents, who succeeded to the Two Brothers, proceeded to complete the same, but were stopped by a *Sist* (Injunction) upon a Bill of *Suspension* brought by the Appellant, when the Level was within Forty Fathoms of the March or Extremity of the Lands of *Niddry* next adjoining to *Edmonstone*.

Matters being in this Situation, the Subject in Dispute was submitted by the Parties to the Arbitration of the Lord President of the Court of Session:—By the Submission or Arbitration Bonds, they submit and refer "all Questions and Debates presently subsisting betwixt them, in relation to the carrying on and communicating of the said Level, as mentioned in the foresaid depending Bills of *Suspension*, Answers, and others given in by both Parties, with Power to the said Arbiters, to take all Proof which he shall judge necessary in relation to the Premises, either before himself or any Commissioner or Commissioners to be named by him, which Proof the Parties to these Presents agree, shall be held as legal Evidence in any After-Process or Submission relative to the Premises, in case no Decree Arbitral shall follow in consequence of this present Submission: And with Power to the said Arbiters, if he shall see Cause, to give such Orders as to carrying on the said Level during the Dependence of the Submission, as he shall think just and reasonable, without hurting the Interest or Claim of the said *Andrew Wauchope*, till the final Determination of the Points thereby submitted."

The Arbitrator, in virtue of these Powers, did, of this Date, make an Interim Decree or Award, "Authorising the Respondent forthwith to proceed in working up the Level in question to the Boundary of the Coal of *NIDDRY*, with that of *EDMONSTONE*, and then opening the said Level into the Coal of *EDMONSTONE*, in order to carrying the same forward to the Coal within the Lands of *WOOLMET*, always reserving to himself, after more full Consideration and Deliberation, to determine the other Points submitted to him by the Parties."

The Level was accordingly carried on from the Appellant's Estate, through the Angle of the *Edmonstone* Estate, interjected between *Niddry* and *Woolmet*, into the *Woolmet* Colliery.—And soon thereafter, at the Desire of the Appellant and with the Consent of the Respondent, the Arbitrator allowed the Submission to expire.

The Appellant thereafter brought an Action against the Respondents in the Court of Session, concluding, "That they ought and should be decreed and ordained, conjunctly and severally, to make payment to him of the Sum of 300*l*. Sterling Money

" Money yearly, from the Day of that the aforesaid Level of the Coal of Niddry was opened and communicated by them to the aforesaid Coals of Edmonstone and Woolmet; being the Value of the 20th Part of the said Coals in Time coming, ay and until they shall cause to be delivered to the said Pursuer (Appellant) the 20th Part of the said Coal, as the same is raised and wrought, according as the Value of the Coal wrought, or hereafter to be wrought, shall be proven by the Books kept of the said Coal, or otherwise, *prout de jure*, in the Course of the Process to follow hereon; at least, if it should be found, that the Defendants are not liable in Payment to the Pursuer of the aforesaid 20th Part of the Coals raised and to be raised by them in Manner aforesaid; then, and in that Case, it ought and should be found and declared by Decree aforesaid, that the Pursuer may stop and shut up the aforesaid Level of Communication between the Level of the Niddry Coal and the Coals of Edmonstone and Woolmet, and keep the same stop and shut up in all Times coming: And further, it ought and should be found and declared, that the said John Macdowal and Sir Archibald Hope are bound by the aforesaid Tack, set by the Pursuer to John Biggar, to procure and obtain from the Earl of Abercorn the perpetual Use and Servitude of his Level, through the Lands of Dudingston to the Sea, for carrying off the Water from Niddry Coal; and they ought and should be decreed and ordained to procure and deliver to the Pursuer a Writing from the Earl of Abercorn in his Favours, giving the perpetual Use and Servitude of his Level accordingly; and in case it shall be found, that the Earl of Abercorn is not bound in Law to give the Use of his Level to the Pursuer, but that he may shut up the same, whereby the Pursuer's Coal will be drowned; then the said John Macdowal and Sir Archibald Hope ought and should be decreed, conjunctly and severally, to make payment to the Pursuer of the Sum of 20,000 l. Sterling, as the Amount of the Damage he will thereby sustain: And further, the said John Macdowal and Sir Archibald Hope ought and should be prohibited and discharged by Decree aforesaid, from communicating the said Level of Niddry Coal to the Coal of any other neighbouring Heritor, without the special Advice and Consent of the said Pursuer: And lastly, the said John Macdowal and Sir Archibald Hope ought and should be decreed and ordained by Decree aforesaid, to make payment to the Pursuer of the Sum of 1000 l. Sterling, in Name of Damages, and as the Expence the Pursuer has already sustained by the aforesaid Level's being communicated in Manner aforesaid, and the Expences of the Process to follow hereupon."

24th Feb. 1770. This Action came to be heard before the Lord Kennet Ordinary; and no Opposition being made to the last Conclusion of the Appellant's Declaration, respecting the Communication of the Level to the Coal of any neighbouring Land-Owner above Woolmet without the Appellant's Consent, the Lord Ordinary, by Interlocutor of this Date, bearing to be by Consent, found, That under the Lease libelled, the Defender, Mr. Hope (now Sir Archibald Hope) cannot communicate the Level in the Estate of Woolmet to any Heritor's Coal above that Estate, without Consent of the Pursuer, Mr. Wauchope of Niddry; and appointed both Parties to give in Memorials upon the other Points of the Cause."

To the other Conclusions of the Appellant's Libel, respecting the shutting up the Communication of the Niddry Level to the Grounds of Edmonstone and Woolmet, and the Compensation for the Benefit which had arisen, or might arise, by the Communication to the Coal of Edmonstone and Woolmet, the Respondents answered,—That Mr. Biggar's View from the Beginning, in all the Treaties and Transactions respecting the Level, was to carry up the same to the Woolmet Coal.—That the Level was considered as a common Property between the Parties, and that the Consideration for its Communication to other Estates, was to be equally divided between the Appellant and him, free to their respective Collieries of Niddry and Woolmet.—That the Restrictions respecting the Communication to any neighbouring Lands, were not meant to comprehend Woolmet or Edmonstone, which last lying between Niddry and Woolmet, made it necessary, for coming at the Woolmet Coal, that the Level should be carried through them.—That such was the Sense and Understanding of the Parties at the Time the Lease of the Niddry Coal was made; and therefore that the Appellant's Demand of Compensation had no Foundation.

As to the Appellant's other Demand respecting the Obligation to procure the Earl of Abercorn's Consent to a perpetual Communication of the Dudingston Level to the Niddry Coal;—the Respondents answered,—That as in the Appellant's Lease to Mr. Biggar, Lord Abercorn's Lease to him was stated to be the Title to the Dudingston Level, Biggar was bound to communicate such Right only as he himself had from Lord Abercorn: That the Apprehension of the Level's being shut up by Lord Abercorn was groundless, as by a former Judgment in a Question between his Lordship and Mr. Wallace, it had been determined, that he could not shut up the said Level.

7th Feb. 1771. The Court pronounced this Interlocutor: " Upon Report of the Lord Kennet, and having advised the Informations for both Parties, THE LORDS FIND, That John Biggar had a Right by the Lease entered into betwixt him and the Pursuer, to carry his Level through the Pursuer's Lands, and to communicate the same to the Coal of Woolmet; and therefore find, That the Pursuer is not entitled to a Recompence from the Defendants on account of the Communication of the said Level to the Coal of Woolmet, nor on account of its being carried through a Part of Edmonstone Ground and Coal, which lies interjected between Niddry and Woolmet, in respect the carrying it through Edmonstone Coal was essentially necessary for communicating the Level with Woolmet, which was one great View of the Parties at entering into the Contract: And find, That the Pursuer cannot shut up the said Level, but that the Communication thereof to Woolmet Coal must subsist for the Use of the Defendants, who derive Right to Woolmet Coal as Heirs or Assignees of the said deceased John Biggar; so long as they shall continue to have Right and Interest in the said Coal of Woolmet; and therefore assilzie the Defendants from these Conclusions of the Pursuer's Libel, and decern; and remit to the Lord Ordinary to hear Parties further on the other Points of the Cause, and to do therein as he shall find just."

28th Jan. 1773. The Appellant, without asking a Decision upon these other Points (one of which is the Ground of the present Appeal) brought the Cause before your Lordships: When you were pleased to order and adjudge, " That the said Interlocutor complained of in the said Appeal be, and the same is hereby reversed: And it is hereby declared, That John Biggar had no Right by the Lease entered into between him and the Appellant, to communicate the Level carried through the Appellant's Lands to the Lands of Edmonstone or Woolmet, without the Appellant's Consent first had and obtained: And it is further ordered, That the Cause be remitted to the Court of Session, to do thereupon what shall be agreeable to Law and Justice."

15th Feb. 1773. The Appellant thereafter presented a Petition to the Court of Session, praying that Court, " To find and declare in Terms of the Judgment upon the Appeal.—2dly, And in consequence thereof to find, That the Petitioner (Appellant) is at Liberty forthwith to proceed in shutting up the aforesaid Level, where it communicates from the Lands of Niddry into the Lands of Edmonstone. 3dly, To ascertain what Consideration ought to be paid to the Petitioner by the Defendants, Sir Archibald Hope and Captain M'Dowal, for the Benefit and Advantage which they have had in raising Coals on the Lands of Edmonstone and Woolmet, by Means of the said Level, since it was first communicated to the Lands of Edmonstone; or what further Quantities of Coal they shall raise in said Grounds of Edmonstone and Woolmet, ay and until the aforesaid Communication is effectually shut up.—4thly, To find the Defendants, Sir Archibald Hope and Captain M'Dowal, bound and obliged to obtain from Lord Abercorn, and deliver to the Petitioner, a perpetual Communication of the Dudingston Level to the Niddry Coal, and to decern and declare accordingly."

19th Feb. 1773. The Court pronounced this Interlocutor: " Having heard the foregoing Petition, with the Judgment of the House of Peers; they, in Terms of that Judgment, find and declare, That John Biggar had no Right by the Lease entered into between him and the Petitioner, to communicate the Level carried through the Petitioner's Lands to the Lands of Edmonstone and Woolmet, without the Consent of the Petitioner first had and obtained thereto; and remit the whole other Points in the Petition to the Lord Kennet Ordinary, with Power to him to do therein as he shall see just."

The Cause coming afterwards to be heard before the Lord Ordinary, and his Lordship signifying, that he would report the Debate to the Court, the Parties gave in Informations upon the Points debated.

The Appellant chiefly insisted upon his Conclusion for shutting up the Level.—He contended, That this was a Right consequential of your Lordships Judgment, determining, That John Biggar had no Right, by the Lease entered into between him and the Appellant, to communicate the Level carried through the Appellant's Lands to the Lands of Edmonstone and Woolmet, without the Appellant's Consent first had and obtained.

The Respondents, on the other Hand, contended,—That your Lordship's Judgment was singly upon the Construction of the Lease itself.—That nothing farther was done, or meant to be done, by your Lordships than determining, in the Abstract, that



Construction, viz. That *John Biggar* had no Power, by the said Lease, to extend the Level further than the Lands of *Niddry*, without the Appellant's Consent.—That no Regard was had to any subsequent or collateral Right or Proceeding, by which the Respondent might be entitled to the Communication of the Level independent of the Lease.

That by the Submission subsequent to the Lease, the Arbitrator was empowered to pronounce such Decrees and Orders for carrying on the Level as he should judge proper:—That, in consequence of these Powers, he did order, that the Level should be carried across the Boundary into the Lands of *Edmonstone* and *Woolmet*—and which was done accordingly:—That no Wrong was thereby committed; and the Respondents are entitled to the Communication of the Level, made in consequence of Powers consented to by the Appellant himself in the Deed of Submission.

The Appellant answered,—That it was not improbable, that when the *Interim* Order was made, the Arbitrator had it in View to perpetuate this Communication to the Level to these superior Grounds, so long at least as the Respondents Right to these Coaleries should subsist upon a proper Recompence and Satisfaction being decreed to the Appellant; but as this Order was only meant as a temporary Expedient till Matters should be prepared for a final Decree, the Communication of the Level thereby appointed, behoved to cease when the Submission itself expired, without such final Decree or Award being made:—That it is implied in the Nature of all Submissions, that the Decree Arbitral, or Award, must exhaust the whole Matters submitted:—That it appeared, from the Clause in the present Submission agreeing to partial Awards, that the Effect of them was understood to depend upon the final Award; and therefore the Appellant was at liberty, notwithstanding of the *Interim* Order of the Arbitrator, to shut up the Communication of the Level.]

The Respondents replied,—That, by the Expiration of the Submission, it became impossible to say what might have been the Judgment of the Arbitrator upon the other Questions in Dispute; but as under the express Power given by the Submission the Level had been communicated, there was a *jus quasitum* to the Respondents, of which they could not be deprived by any other Point not having been determined:—That it was a Mistake to suppose, that the Proceedings under the Submission must fall to the Ground when the whole Matters submitted were not determined:—That this could only be the Case where the Parties gave no Power to the Arbitrator to give partial Awards or Decrees, thereby shewing, that the Subject Matter of the Submission could not be divided.—Where a partial Award is given, and the Submission happens to expire before certain other Points submitted are determined, if the Parties are not disposed to renew the Submission, they can only be decided in a Court of Justice.—That the Appellant in this Case might have these other Points tried; but whether the Level should be communicated or not, was no longer a Question; and the Appellant, therefore, could not shut up the Level, of which the Respondents were in Possession, under a Judgment of the Arbitrator in their Favour.—The Respondents likewise submitted to the Court, That, as they were extremely willing that the Arbitrator should have proceeded to determine all the Points disputed, and as it was entirely the Fault of the Appellant that the Arbitrator did not determine them, any Claim, which he might otherwise have had on account of the Level's being communicated, was not now competent.

The Appellant did admit, That the *Interim* Order by the Arbitrator would be sufficient to protect the Respondents from any Claim of Damages upon account of any supposed tortious Proceedings upon their Part, in carrying the Level beyond the Boundary of the Lands of *Niddry* into any of the neighbouring Grounds; but he contended, that his present Claim was not of that Nature, but merely for *Restitution*, and to have Matters replaced *in statu quo*, by shutting up the Level, the Expence of which ought to lie upon the Respondents.

That with respect to the Recompence and Consideration which ought to be paid to him for the Communication of the Level to the Grounds of *Edmonstone* and *Woolmet*, it would depend upon the Endurance of the Communication, and of the Profits which had arisen or might arise therefrom, so long as it had been or shall be kept open. That what Sum shall be deemed a suitable Recompence for this Communication of the *Niddry* Level must be in *arbitrio judicis* according to Circumstances:—That before the Communication of the Level to the *Woolmet* Coal-Pits, they were full of Water:—That it was impossible, without a Level or Fire-Engine, to work the Coal;—and the last would have been attended with a considerable annual Expence:—That this Claim, for One-twentieth Part of the Profits that have already accrued, or that shall hereafter arise, upon the Coals raised from these Coaleries to which the Level had been communicated, seemed well founded;—and he was informed, such Proportion had been paid in other Places for like Advantages.—But that no Judgment could pass upon this Branch of the Cause till a previous Determination was had, Whether he was entitled to have the Communication of the *Niddry* Level shut up, and till Trial is made whether that can be effectually done.

The Respondents answered,—That was the Level to be shut up, and supposing there had never been a Submission or Award, the only Consequence of your Lordships' Judgment would have been, to put Matters on the Footing as if the Respondents had taken Possession of the Level at their own Hand, without any Consent or Authority; and the Appellant could only have recovered of the Respondents such Damages as he could shew he had suffered in his Property by their Act:—That, if this would be the Decision of the Law in the Case of a tortious Act or Communication, it could upon no Principle be maintained, that because the Level was communicated from the Lands of *Niddry* to *Woolmet*, not only without any Tort of the Respondents, but with previous Power and Consent on the Part of the Appellant, given the Arbitrator, and by Authority of his Award, that they should be in a worse Situation than if they had unlawfully invaded the Appellant's Property: That the Appellant's Demand, therefore, can never be carried further than to be put *in statu quo*, as at the Date of the Arbitrator's Decree or Award; or, in other Words, that he should be at liberty to put the Level in the same Situation it was in at the Time the Award was made, and further reimbursed of any Damage he may have sustained since the Communication of the Level.

2dly, The Respondents contended, That if any Consideration was, notwithstanding, thought to be due to the Appellant by the Respondents, for any Benefit which they may have received from the Communication of the Level, it could go no farther than to a Share of the Profits arising to them from the Coal in the Lands of *Edmonstone*; the only Communication of the Appellant's Level being into the Angle of *Edmonstone* Estate, which intervenes between the Lands of *Niddry* and *Woolmet*; and it depending upon Mr. *Wauchope* of *Edmonstone*, not upon the Appellant, whether it should be carried forward to *Woolmet*:—That in Fact, therefore, Mr. *Wauchope* of *Edmonstone*, and not the Appellant, would be intitled to the Consideration for the Communication of the Level to the Coal of *Woolmet*.

The Respondents likewise stated sundry Circumstances to correct the Appellant's extravagant Notions and Representations of the Advantages the Respondents had received from the Communication of the Level, and which, at the same time, shewed that he himself had derived the greatest Benefit from it;—Circumstances which ought to weigh much with a Court of Justice in determining a Question of Compensation.—And the Respondents concluded with observing, that their Situation was singularly hard; they were at the sole Expence of making this Level, which cost many Thousand Pounds, whereby this Appellant has got a large Estate, which will yield, at a moderate Computation, 70,000 *l.* of gross Produce, and which before was let at the trifling Rent of 55 *l.* 11 *s.* 2 *d.* Sterling. They have also incurred a very great Expence by the various Law-Suits which have been occasioned by it;—and the Earl of *Abercorn* is insisting likewise for a Consideration, not only on account of the Level's being communicated to *Woolmet*, but also for a Consideration for all the other Estates to which it has already or hereafter may be communicated: And yet the only Advantage which the Respondents can possibly reap by this Level, as Matters now stand, is for the few Years which the Lease of *Woolmet* is to endure. Mr. *Biggar* could never believe, that by carrying this Level to *Woolmet*, he was to be liable both to Lord *Abercorn* and the Appellant, not only for a Consideration to both of them for *Woolmet*, but also for all the Land-Owners to whose Estates the Level might afterwards be communicated.

Upon the third Conclusion of the Appellant's Action,—the Respondents procuring to him a perpetual Communication of the *Dudingston* Level to the Grounds of *Niddry*, or furnishing him with a Decree or Judgment of the Court, establishing his Right to such a perpetual Communication;—the Respondents answered, That the Appellant, in arguing this Point, took it for granted that the Contract run in Terms and contained Words not to be found in it. Mr. *Biggar*, by the Leave, comes

comes under no Obligation to procure a perpetual Communication from Lord Abercorn; he only becomes bound to procure his Lordship's Consent to communicate the Level to Niddry. This he did, and the Appellant is accordingly in Possession of the Level; but Mr. Biggar came under no Obligation to warrant that Communication, when made, to Perpetuity.—But, 2dly, As the Communication of the Level from Dudingston to Niddry was lawfully made, the Owner of Dudingston could not do it, if practicable, without occasioning the Water to regorge upon the superior Proprietor, which no inferior Proprietor has a Right to do.—3dly, That a Question had occurred relative to this Level between the Earl of Abercorn and Mr. Wallace, where it was maintained, That the Benefit of the Level granted by the Earl should cease with the Expiry of the Tack with which it was granted. But in this Plea the Noble Lord was over-ruled, both in the Court of Session and before your Lordships; and it was found, “That the Communication of the Level being granted during the Currency of the Tack by the Lessee to a neighbouring Coal-work, is not determinable by the Terms of the Tack, but that the same may subsist for the Use of the Lessee and his Heirs, so long as they shall continue to have Right and Interest in the neighbouring Coals to which the Level shall be communicated, as the said neighbouring Coals are ascertained by the Interlocutors of 23d December 1760, and 6th March 1761.”—4thly, The Respondents contended, That the Obligation Mr. Biggar came under to the Appellant, to procure Lord Abercorn's Consent, was fulfilled by the Communication of the Level to the Lands of Niddry. He agreed to communicate the Right he had from Lord Abercorn; but he came under no Obligation to communicate a better Right than he himself had. The Obligation he came under to the Appellant recites and states the Right he had from Lord Abercorn as his Title to communicate the Level. The Appellant does not pretend to stipulate a better Right than he knew Mr. Biggar had a Power to give: He accepted of the Dudingston Level under all the Powers which the Proprietor of Dudingston then had or might acquire over it. The Transaction, therefore, was no more than an Assignment of the Powers which Mr. Biggar had to the Dudingston Level, which were completely exercised by granting the Communication.

Dec. 9th, 1773.
Interlocutor in
Part appealed
from.

The Court pronounced this Interlocutor: “On Report of the Lord Kennet, and having advised the Informations hinc inde, in respect that the Level from the Lands of Niddry was communicated into the Lands of Edmonstone and Woolmet, by Order of the Arbitrator chosen by the Parties to determine the Questions between them concerning the said Level, and which Order the Arbitrator had Power to pronounce; therefore the Lords FIND, That the Pursuer Andrew Wauchope of Niddry, during the Subsistence of the Defenders, Sir Archibald Hope and Captain John McDowal their Rights and Interests in the Collieries of Edmonstone and Woolmet, in virtue of their present Leases, is not intitled to shut up the foresaid Level; BUT FIND, That the said Defenders, for any Benefit which it shall appear that they have enjoyed, or shall hereafter enjoy, by means of said Communication for raising Coals in the Lands of Edmonstone and Woolmet, are liable to the Pursuer in a Recompence on that Account: Farther, THE LORDS FIND the said Defenders, in consequence of the Lease of the Niddry Coal by the Pursuer to John Biggar, liable to warrant a Communication of the Dudingston Level to the Niddry Coal, so long as their present Right to the said Dudingston Level shall subsist, but no longer; AND REMIT to the Lord Ordinary to proceed accordingly, and to hear Parties on any other Points of the Cause, and to do as he shall see just.”

Dec. 17th, 1773.

As the Consequence of this Judgment would be to involve the Respondents in a great deal more Litigation with the Appellant, they came to the Resolution of agreeing to submit to the chief Point in the Prayer of his Petition, which prayed the Court to find, That he is at Liberty forthwith to proceed in shutting up the foresaid Level, where it communicates from the Lands of Niddry to the Lands of Edmonstone:—The Minutes of this Date bear, “That the Solicitor for Sir Archibald Hope represented, That the Cause of the Disputes betwixt the Parties was owing to an Interim Order by the Arbitrator:—That he now for Sir Archibald judicially desired Mr. Wauchope to put the Level of the Coal in the precise Situation it was in at the Time the Arbitrator pronounced the Interim Order.”

11th Jan. 1774.

Rae (Counsel for Mr. Wauchope) answered, “That he could not at present give any Answer to the above Demand,” upon which the Lord Ordinary pronounced this Interlocutor, “Ordains Mr. Wauchope, against next Calling, to give an Answer to the above Demand.”—The Respondents afterwards enrolled the Cause before the Lord Ordinary, that the Appellant might give his Answer as directed by his Lordship's Interlocutory Order; which he still declining, they preferred a Reclaiming Petition to the whole Lords, wherein they stated their judicial Concession; and in respect thereof, prayed their Lordships to find, that the Appellant could have no Claim against them in time coming, on account of the Communication of the Level; and that, as to Time past, they could be no further liable than to the Extent of the Damages which the Appellant shall have sustained in his Property by the Niddry Level having been communicated to Edmonstone and Woolmet, at least, that any Consideration to be given, can only be commensurated by the Profits arising to the Respondents from the Coal of Edmonstone.

This Petition was ordered to be answered by the Appellant; but in place of answering the same, or waiting till the Cause should be finally determined, he presented a Petition and Appeal, wherein, notwithstanding of the Concession of the Respondents of 17th December 1773, he appeals from the Interlocutor of 9th December 1773, in so far as it finds the Appellant, during the Subsistence of the Respondents, their Right and Interest in the Collieries of Edmonstone and Woolmet in virtue of their present Leases, is not entitled to shut up the foresaid Level; and in so far as it finds, that they are liable to warrant a Communication of the Dudingston Level to the Niddry Coal, so long as their present Right to the said Dudingston Level shall subsist, but no longer. But the Respondents humbly hope, that these Parts of the Interlocutors complained of by the Appellant will be affirmed, with Costs, and the Cause remitted to the Court of Session, that they may proceed to determine the other Points brought under Review by the Respondents Reclaiming Petition, for the following, or other

R E A S O N S :

- I. The Communication of the Level to the Woolmet-Colliery was made in consequence of the Award of the Arbitrator mutually chosen by both Parties, pursuant to special Powers given him for that Purpose by these Parties in the Submission or Bond of Arbitration.—And having been so made, it cannot now be shut up, but by Consent of both Parties.—Besides the now Demand of the Appellant for shutting up the Level, is inconsistent with the Conclusions of his own Libel or Declaration in this very Cause: As there, he first, concludes, For a Consideration for the Benefit of the Level in all Time coming: And it is only in the Event of his failing to obtain such Consideration, that the other Conclusion for shutting up the Level is added.—So circumstanced therefore, the only Question before the Court on this Part of the Cause, was, with respect to the Share of the Consideration which the Appellant might be entitled to for a Continuation of such Communication, after the Cause was returned, the Respondents having before that Time possessed the Level, bona fide, under the Authority of the Award of the Arbitrator, and of the first Judgment of the Court below in their Favour.—And the Respondents, by the judicial Offer which they made (for the Sake of Peace, and to prevent a disagreeable, tedious, and expensive Litigation) put an End to every Question on that Point, and to any Pretence for a Claim of Consideration in favour of the Appellant, after the making such judicial Offer. The Appeal, brought after such Offer, and when another Part of the same Interlocutor was kept open for Judgment by the Respondents Reclaiming Petition under Order to be answered, (and while several other Points in the Cause are still undetermined) is to the last Degree wanton and vexatious.
- II. Supposing the judicial Offer of the Respondents out of the Case, they contend, That these Parts of the Interlocutor of 9th December 1773, complained of by the Appellant, are agreeable to Law and Justice, and conformable to the Judgment of your Lordships.—That Judgment, in so far as it reversed the Decree of the Court of Session, is (with great Submission) merely a general Reversal, taking the former Decree out of the Way, in order to let in your Lordships declaratory Judgment which follows the Words of Reversal: But without establishing or meaning to establish any Thing further, than the taking out of the Case the Decree of the Court below, and substituting in its Place your Lordship's declaratory Judgment, leaving every Thing else in the Cause open to be determined

determined by the Court below: The only Thing settled by your Lordships declaratory Judgment is, That John Biggar had no Right, by the Lease, to communicate the Level without Consent of the Appellant: Such Consent he has already given by empowering the Arbitrator to consent for him;—this was done, and the Level communicated in consequence thereof.—That Question therefore had been previously determined by the Agreement of Parties.—And with respect to the Consideration, (a Point in the Cause still undetermined) the Lease which confiders the Continuation of the Level a joint Concern, in which both Parties were equally to share, thereby points out a certain Mode for ascertaining the Appellant's Share of such Consideration, if any shall ultimately be found due.

Mr. Biggar came under no Obligation to procure from Lord Abercorn a perpetual Communication of the Duddingston Level to the Coal of Niddry;—there is no Mention made in the Lease of a perpetual Communication;—Mr. Biggar only became bound to procure Lord Abercorn's Consent to communicate the Level to the Niddry Coal, and this has accordingly been done long ago; but Mr. Biggar came under no Obligation to warrant that Communication when made to Perpetuity. The sole Foundation of the Transaction between the Appellant and Mr. Biggar, was the Lease from Lord Abercorn to Mr. Biggar; and the Appellant knowing the Nature of Mr. Biggar's Right, could never expect or mean to acquire a better Right than Mr. Biggar himself was possessed of: But the Appellant now enjoys the Use of Lord Abercorn's Level, under a Title which, the Respondents are advised, cannot be defeated. In the present Case, it is sufficient for their Purpose to say, that the Judgment of your Lordships secures that Enjoyment to the Appellant, so long as the Respondents have an Interest in the superior Coal-Works.

E. THURLOW.
AL. WEDDERBURN.
HENRY DUNDAS.

Die Martis 20. Aprilis 1774.

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ration above mention'd be Revok'd: And as to that part of the
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Lord Abercorn to a communication of the Duddington Level to the Niddry
It is further Declard^d that as the Question materially turns
on the construction of the Covenant enter'd into by the Earl of Abercorn
as was granted by him to John Biggar therefore complet^e
cannot be done but in a Suit to which the said Earl is a party
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and do give all proper Directions for carrying this Judgment
into execution.

comes under no Obligation to procure a perpetual Communication from Lord Abercorn; he only becomes bound to procure his Lordship's Consent to communicate the Level to Niddry. This he did, and the Appellant is accordingly in Possession of the Level; but Mr. Biggar came under no Obligation to warrant that Communication, when made, to Perpetuity.—But, 2dly, As the Communication of the Level from Dudingston to Niddry was lawfully made, the Owner of Dudingston could not do it, if practicable, without occasioning the Water to regorge upon the superior Proprietor, which no inferior Proprietor has a Right to do.—3dly, That a Question had occurred relative to this Level between the Earl of Abercorn and Mr. Wallace, where it was maintained, That the Benefit of the Level granted by the Earl should cease with the Expiry of the Tack with which it was granted. But in this Plea the Noble Lord was over-ruled, both in the Court of Session and before your Lordships; and it was found, “That the Communication of the Level being granted during the Currency of the Tack by the Lessee to a neighbouring Coal-work, is not determinable by the Terms of the Tack, but that the same may subsist for the Use of the Lessee and his Heirs, so long as they shall continue to have Right and Interest in the neighbouring Coals to which the Level shall be communicated, as the said neighbouring Coals are ascertained by the Interlocutors of 23d December 1760, and 6th March 1761.”—4thly, The Respondents contended, That the Obligation Mr. Biggar came under to the Appellant, to procure Lord Abercorn's Consent, was fulfilled by the Communication of the Level to the Lands of Niddry. He agreed to communicate the Right he had from Lord Abercorn; but he came under no Obligation to communicate a better Right than he himself had. The Obligation he came under to the Appellant recites and states the Right he had from Lord Abercorn as his Title to communicate the Level. The Appellant does not pretend to stipulate a better Right than he knew Mr. Biggar had a Power to give: He accepted of the Dudingston Level under all the Powers which the Proprietor of Dudingston then had or might acquire over it. The Transaction, therefore, was no more than an Assignment of the Powers which Mr. Biggar had to the Dudingston Level, which were completely exercised by granting the Communication.

Dec. 9th, 1773.
Interlocutor in
Part appealed
from.

The Court pronounced this Interlocutor: “On Report of the Lord Kennet, and having advised the Informations hinc inde, in respect that the Level from the Lands of Niddry was communicated into the Lands of Edmonstone and Woolmet, by Order of the Arbitrator chosen by the Parties to determine the Questions between them concerning the said Level, and which Order the Arbitrator had Power to pronounce; therefore the Lords FIND, That the Pursuer Andrew Wauchope of Niddry, during the Subsistence of the Defenders, Sir Archibald Hope and Captain John McDowal their Rights and Interests in the Collieries of Edmonstone and Woolmet, in virtue of their present Leases, is not intitled to shut up the foresaid Level; BUT FIND, That the said Defenders, for any Benefit which it shall appear that they have enjoyed, or shall hereafter enjoy, by means of said Communication for raising Coals in the Lands of Edmonstone and Woolmet, are liable to the Pursuer in a Recompence on that Account: Farther, THE LORDS FIND the said Defenders, in consequence of the Lease of the Niddry Coal by the Pursuer to John Biggar, liable to warrant a Communication of the Dudingston Level to the Niddry Coal, so long as their present Right to the said Dudingston Level shall subsist, but no longer; AND REMIT to the Lord Ordinary to proceed accordingly, and to hear Parties on any other Points of the Cause, and to do as he shall see just.”

Dec. 17th, 1773.

As the Consequence of this Judgment would be to involve the Respondents in a great deal more Litigation with the Appellant, they came to the Resolution of agreeing to submit to the chief Point in the Prayer of his Petition, which prayed the Court to find, That he is at Liberty forthwith to proceed in shutting up the foresaid Level, where it communicates from the Lands of Niddry to the Lands of Edmonstone:—The Minutes of this Date bear, “That the Solicitor for Sir Archibald Hope represented, That the Cause of the Disputes betwixt the Parties was owing to an Interim Order by the Arbitrator:—That he now for Sir Archibald judicially desired Mr. Wauchope to put the Level of the Coal in the precise Situation it was in at the Time the Arbitrator pronounced the Interim Order.”

11th Jan. 1774.

Rae (Counsel for Mr. Wauchope) answered, “That he could not at present give any Answer to the above Demand,” upon which the Lord Ordinary pronounced this Interlocutor, “Ordains Mr. Wauchope, against next Calling, to give an Answer to the above Demand.”—The Respondents afterwards enrolled the Cause before the Lord Ordinary, that the Appellant might give his Answer as directed by his Lordship's Interlocutory Order; which he still declining, they preferred a Reclaiming Petition to the whole Lords, wherein they stated their judicial Concession; and in respect thereof, prayed their Lordships to find, that the Appellant could have no Claim against them in time coming, on account of the Communication of the Level; and that, as to Time past, they could be no further liable than to the Extent of the Damages which the Appellant shall have sustained in his Property by the Niddry Level having been communicated to Edmonstone and Woolmet, at least, that any Consideration to be given, can only be commensurated by the Profits arising to the Respondents from the Coal of Edmonstone.

This Petition was ordered to be answered by the Appellant; but in place of answering the same, or waiting till the Cause should be finally determined, he presented a Petition and Appeal, wherein, notwithstanding of the Concession of the Respondents of 17th December 1773, he appeals from the Interlocutor of 9th December 1773, in so far as it finds the Appellant, during the Subsistence of the Respondents, their Right and Interest in the Collieries of Edmonstone and Woolmet in virtue of their present Leases, is not entitled to shut up the foresaid Level; and in so far as it finds, that they are liable to warrant a Communication of the Dudingston Level to the Niddry Coal, so long as their present Right to the said Dudingston Level shall subsist, but no longer. But the Respondents humbly hope, that these Parts of the Interlocutors complained of by the Appellant will be affirmed, with Costs, and the Cause remitted to the Court of Session, that they may proceed to determine the other Points brought under Review by the Respondents Reclaiming Petition, for the following, or other

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the Appell^t to add proper Parties to this or to bring a new
as he shall be advised And that the Court of Session in
and do give all proper Directions for carrying this Judgment
Execution.



Andrew Wauchope, *Esquire*, - Appellant.
Sir Archibald Hope, *Baronet*, and } Respondents.
Captain John Macdowal,

The Respondents C A S E.

To be heard at the Bar of the House of Lords on
Tuesday the 29th Day of March 1774.

